

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

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IN THE OFFICE OF

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In re:)
Request for Regulatory)
Determination filed by)
D. E. Hines concerning)
a memorandum issued by)
the Department of Correc-)
tions interpreting Title)
15 of the California Code)
of Regulations, section)
3392 ("Punctuality"),)
which sets forth the)
time frame within which)
an employee must call in)
sick to a supervisor 1)

1989 OAL Determination
[Docket No. 88-007]

April 5, 1989

Determination Pursuant to
Government Code Section
11347.5; Title 1, California
Code of Regulations,
Chapter 1, Article 2

Determination by:


JOHN D. SMITH
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Herbert F. Bolz, Coordinating Attorney
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Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether a memorandum dated October 1, 1987, issued by the Department of Corrections concerning the time frame in which an employee must call in sick to a supervisor is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law concludes that the above-noted memorandum is a "regulation," but is nonetheless exempt from the Administrative Procedure Act because it relates solely to the internal management of the Department of Corrections.

THE ISSUE PRESENTED 2

The Office of Administrative Law ("OAL") has been requested to determine³ whether the memorandum issued by the Department of Corrections ("Department") interpreting Title 15, California Code of Regulations, section 3392 ("Punctuality") and specifying the time frame within which an employee must call in sick to a supervisor is (1) a "regulation" as defined in Government Code section 11342, subdivision (b), (2) required to be adopted pursuant to the Administrative Procedure Act ("APA"), and (3) therefore violates Government Code section 11347.5, subdivision (a).⁴

THE DECISION 5, 6, 7, 8

OAL concludes that the above-referenced memorandum is a "regulation" as defined in the APA,⁹ but is not subject to the requirements of the APA because the challenged memorandum comes within the "internal management" exemption contained in Government Code section 11342, subdivision (b).

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

California's first, and for many years only, prison was located at San Quentin. As the decades passed, additional institutions were established, leading to an increased need for uniform statewide rules. Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.¹⁰

Authority ¹¹

Penal Code section 5058, subdivision (a), provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . ." [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

Penal Code section 5058, subdivision (a), provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations shall be promulgated and filed pursuant to [the APA]" [Emphasis added.]

In any event, the APA applies to all state agencies, except those "in the judicial or legislative departments."¹² Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.¹³

General Background

The following undisputed facts and circumstances have given rise to the present Determination.

In June, 1988, D. E. Hines, a correctional officer, filed a Request for Determination which concerns a memorandum dated October 1, 1987, and signed by S. Cambra, the Deputy Warden of San Quentin. Mr. Hines paraphrased the challenged memorandum as stating that ". . . employees that are unable to report to work must notify his or her supervisor two (2) hours prior to the start of their shift."¹⁴

II. DISPOSITIVE ISSUES

There are two main issues before us:¹⁵

- (1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure,
... ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

" (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

The answer to the first part of the inquiry is "yes."

For an agency rule to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.¹⁶ The challenged rule applies to the identifiable class of "all employees" of San Quentin Prison "effective October 1, 1987."

The answer to the second part of the inquiry is also "yes." The memorandum implements, interprets or makes specific Penal Code section 5058 which states in part that "The director may prescribe and amend rules and regulations for the administration of the prisons. . . ." (Emphasis added.) Additionally, the memorandum supplements section 3392 of Title 15 of the CCR which declares that:

"Employees must report for duty promptly at the time directed and not leave work assignments before completion of their scheduled workday or tour of duty, except with their supervisor's permission. If for any reason an employee is unable to report for duty, the employee must notify his or her supervisor at the earliest possible moment." [Emphasis added.]

WE THEREFORE CONCLUDE THAT THE CHALLENGED MEMORANDUM IS A "REGULATION."

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies are not subject to the procedural requirements of the APA.¹⁷

Government Code section 11342, subdivision (b)'s definition of "regulation" contains the following specific exception to APA requirements:

"'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency. . . ." [Emphasis added.]

The internal management exception has been judicially determined to be narrow in scope.¹⁸ A brief review of relevant

case law demonstrates that the "internal management" exception applies if the "regulation" under review (1) affects only the employees of the issuing agency^{19,20} and (2) does not address a matter of serious consequence involving an important public interest.^{21,22}

In Poschman v. Dumke²³, the court held that a Board of Trustees of California State Colleges rule dealing with tenure was not exempt from the APA because

"Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community."²⁴ [Emphasis added.]

In Armistead v. State Personnel Board,²⁵ the California Supreme Court held that a State Personnel Board rule limiting the withdrawal of resignations by state employees was a "regulation" and subject to the APA. The Court rejected the State Personnel Board's argument that the rule was exempt from the APA as internal management because, the court stated,

"[the rule] is designed for use by personnel officers . . . in the various state agencies throughout the state. . . . It concerns . . . a matter of import to all state civil service employees. . . ."²⁶ [Emphasis added.]

Ligon v. State Personnel Board²⁷ dealt with a State Personnel Board memorandum which detailed the procedures and standards by which other state agencies could consider an employee's "out of class" experience for purposes of advancement and promotion within the other agencies. The court's holding that the memorandum constituted a "regulation" was based on the implicit recognition that the challenged policy affected employees throughout the state system.

In Stoneham v. Rushen,²⁸ the Court held that the Department of Correction's issuance of "administrative bulletins" implementing a standardized classification and transfer system for prisoners did not constitute "internal management" because the scheme extended

". . . well beyond matters relating solely to the management of the internal affairs of the agency itself. Embodying as it does a rule of general application significantly affecting the male prison population in the custody of the Department, such a comprehensive classification system is not exempt as a rule of internal management from mandatory compliance with the Act [APA]." [Emphasis added.]²⁹

Determining whether the challenged memorandum comes within the "internal management" exception involves a two-part inquiry:

FIRST, DOES THE CHALLENGED MEMORANDUM AFFECT ONLY THE EMPLOYEES OF THE ISSUING AGENCY?

SECOND, DOES THE CHALLENGED MEMORANDUM ADDRESS A MATTER OF SERIOUS CONSEQUENCE INVOLVING AN IMPORTANT PUBLIC INTEREST?

The answer to the first part of the inquiry is "yes". The challenged memorandum affects only Department of Corrections' employees; no other agency's employees are bound by the requirement to call in two hours prior to the start of a scheduled work shift. In fact, we note that the challenged memorandum mandates the attendance policy only for Department of Corrections' employees at San Quentin Prison.³⁰

The answer to the second part of the inquiry is "no." The "when you have to call in sick" policy does not involve a matter of serious consequence involving an important public interest.

The following are examples of "policies" that have been found to involve a matter of serious consequence involving an important public interest.

The court in Poschman v. Dumke,³¹ found that "Tenure within any school system is a matter of serious consequence involving an important public interest."³²

In 1988 OAL Determination No. 3,³³ we explored the issue of whether the State Board of Control's (Board) policy requiring psychotherapy expenses claimed at certain hourly rates to be reviewed by the Board prior to reimbursement of victims of crime under the Victims of Crime Act, was a "regulation." In that Determination, one factor that clearly substantiated the existence of an "important public interest" was the Legislature's express statement of intent:

"The Legislature has clearly stated [in Government Code section 13959] that there is a public interest in assisting Californians in 'obtaining restitution for the pecuniary losses they suffer as a direct result of criminal acts.'³⁴" [Emphasis added.]

In 1988 OAL Determination No. 6,³⁵ we found that Chapter 7300 of the Department's Administrative Manual, which governs inmate/parolee grievance procedures, involved a significant public interest. The nature of the public interest involved was reflected in sections 7300 and 7301 of the Manual and was summarized in the Determination as "The need to resolve

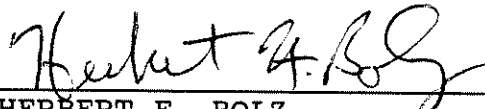
inmate grievances quickly and fairly within the prison system, thus making it unnecessary to expend significant resources litigating such matters in state or federal court." (Emphasis added.)

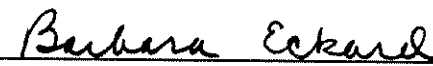
In contrast, the attendance policy specified in the challenged memorandum does not significantly affect either the general "prison population"³⁶ or the general public. Additionally, there is no legislative statement declaring that a public interest exists in the time frame in which an employee must call in sick to a supervisor, regardless of the time period specified. Therefore, we conclude that the attendance policy in issue simply does not constitute a "matter of serious consequence involving an important public interest."³⁷

III. CONCLUSION

For the reasons set forth above, OAL finds that the challenged memorandum is a "regulation," but is nonetheless exempt from the provisions of the Administrative Procedure Act because it relates solely to the "internal management" of the Department of Corrections.

DATE: April 5, 1989


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- 1 This Request for Determination was filed by D. E. Hines, 1460 Funston Drive, Santa Rosa, CA 95407. The Department of Corrections was represented by Marc D. Remis, Staff Counsel, P. O. Box 942883, Sacramento, CA 94283-0001, (916) 445-0495.

To facilitate indexing and compilation of determinations, OAL began as of January 1, 1989 assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination is "186" rather than "1."

- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism"); Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n. 5, 211 Cal.Rptr. 758, 764, n. 5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); Boreta Enterprises, Inc. v. Department of Alcohol Beverage Control (1970) 2 Cal.3d 85, 107, 84 Cal.Rptr. 113, 128 (where agency had failed to adopt, pursuant to the APA, policy statement banning licensees from employing topless waitresses, court declined to "pronounce a rule in an area in which the Department itself is reluctant to adopt one," but also noted agency failure to introduce evidence in the contested disciplinary hearings supporting the conclusion that the forbidden practice was contrary to the public welfare and morals because it necessarily led to improper conduct); vacating, (1969) 75 Cal.Rptr. 79 (roughly the same conclusion; multiple opinions of interest as early efforts to grapple with underground regulation issue in license revocation context); Carden v. Board of Registration for Professional Engineers (1985) 174 Cal.App.3d 736, 220 Cal.Rptr. 416 (admission of uncodified guidelines in licensing hearing did not prejudice applicant); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977)

75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Pacific Southwest Airlines v. State Board of Equalization (1977) 73 Cal.App.3d 32, 140 Cal.Rptr. 543 (invalidating Board policy that aircraft qualified for statutory common carrier tax exemption only if during first six months after delivery the aircraft was "principally" (i.e., more than 50%) used as a common carrier); Sangster v. California Horse Racing Board (1988) 202 Cal.App.3d 1033, 249 Cal.Rptr. 235 (Board decision to order horse owner to forfeit \$38,000 purse involved application of a rule to a specific set of existing facts, rather than "surreptitious rulemaking"); Wheeler v. State Board of Forestry (1983) 144 Cal.App. 3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of proper rule articulating standard by which to measure licensee's competence).

In a recent case, Wightman v. Franchise Tax Board (1988) 202 Cal.App.3d 966, 249 Cal.Rptr. 207, the court found that administrative instructions promulgated by the Department of Social Services, and requirements prescribed by the Franchise Tax Board and in the State Administrative Manual--which implemented the program to intercept state income tax refunds to cover child support obligations and obligations to state agencies--constituted quasi-legislative acts that have the force of law and establish rules governing the matter covered. We note that the court issued its decision without referring to either:

- (1) the watershed case of Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, which authoritatively clarified the scope of the statutory term "regulation"; or
- (2) Government Code section 11347.5.

The Wightman court found that existence of the above noted uncodified rules defeated a "denial of due process" claim. The "underground regulations" dimension of the controversy was neither briefed by the parties nor discussed by the court. [We note that, in an analogous factual situation involving the intercept requirements for federal income tax refunds, the California State Department of Social Services recently submitted to OAL (OAL file number 88-1208-02) Internal Revenue Service (IRS) Tax Refund Intercept Program regulations. These regulations were approved by OAL and filed with the Secretary of State on January 6, 1989, transforming the ongoing IRS intercept requirements from administrative directives into formally adopted departmental regulations.]

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index (see note 17, infra).

See also, the following Opinions of the California Attorney General, which concluded that compliance with the APA was required in the following situations:

Administrative Law, 10 Ops.Cal.Atty.Gen. 243, 246 (1947) (rules of State Board of Education); Workmen's Compensation, 11 Ops.Cal.Atty.Gen. 252 (1948) (form required by Director of Industrial Relations); Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56 (1956) (Department of Industrial Relations rules governing electrical wiring in trailer parks); Los Angeles Metropolitan Transit Authority Act, 32 Ops.Cal.Atty.Gen. 25 (1958) (Department of Industrial Relations's State Conciliation Service rules relating to certification of labor organizations and bargaining units); Part-time Faculty as Members of Community College Academic Senates, 60 Ops.Cal.Atty.Gen. 174, 176 (1977) (policy of permitting part-time faculty to serve in academic senate despite regulation limiting service to full-teachers). Cf. Administrative Procedure Act, 11 Ops.Cal.Atty.Gen. 87 (1948) (directives applying solely to military forces subject to jurisdiction of California Adjutant General fall within "internal management" exception); Administrative Law and Procedure, 10 Ops.Cal.Atty.Gen. 275 (1947) (Fish and Game Commission must comply with both APA and Fish and Game Code, except that where two statutes are "repugnant" to each other and cannot be harmonized, Commission need not comply with minor APA provisions).

3 Title 1, California Code of Regulations (CCR), (formerly

known as California Administrative Code), section 121, subsection (a) provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]."
[Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4 Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.
2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

- 5 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." [Emphasis added.]

6 Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking

agencies but also all interested parties to submit written comments on pending requests for regulatory determination. See Title 1, CCR, sections 124 and 125. The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

The Department submitted a Response to the Request for Determination on February 13, 1989, which was considered in making this Determination. The Response asserted (1) that the challenged memorandum did not meet the definition of a regulation and (2) assuming arguendo that even if the challenged memorandum meets the definition of a "regulation" it comes within the "internal management" exemption.

- 7 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute).
- 8 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.
- 9 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL for the purchase price of \$3.00.
- 10 Penal Code section 5000.
- 11 We discuss the affected agency's rulemaking authority (see

Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rule-making agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rule-making agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

12 Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4, (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, p.____; typewritten version, pp. 117-128.

13 See Winzler & Kelly v. Department of Industrial Relations

(1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative (i.e., "regulatory") activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

- 14 The October 1, 1987, San Quentin memorandum provides in part that

"The recent fiscal review for San Quentin has brought to my attention that the collective coverage based on employee sick leave is excessive. [Par.] The following steps will be required of all employees effective October 1, 1987: Each employee must call prior to the start of their scheduled work shift (either regular assignment shift or scheduled overtime shift) to request time off for sick leave. It is the employee's responsibility to make contact. (Minimum 2 hours in advance of watch.)"

- 15 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

- 16 Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

- 17 The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
- b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
- c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

- d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Kaaren Morris), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$108.

18 See Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1; Stoneham v. Rushen (Stoneham I) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Poschman v. Dumke (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596; 1987 OAL Determination

- No. 13 (Board of Prison Terms, September 30, 1987, Docket No. 87-002), California Administrative Notice Register 87, No. 42-Z, October 16, 1987, pp. 451-453, typewritten version pp. 7-9.
- 19 Id., Armistead, Stoneham I, and Poschman.
- 20 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, p. B-13, typewritten version, p. 6.
- 21 See Poschman, note 18, supra, 31 Cal.App.3d at 943, 107 Cal.Rptr. at 603; and Armistead, note 18, supra, 22 Cal.3d at 203-204, 149 Cal.Rptr. at 3-4.
- 22 1988 OAL Determination No. 3 (State Board of Control, March 7, 1988, Docket No. 87-009) California Administrative Notice Register 88, No. 12-Z, March 18, 1988, pp. 855, 864; typewritten version, p. 10.
- 23 See Poschman, note 18, supra.
- 24 Id., 31 Cal.App.3d at 943, 107 Cal.Rptr. at 603.
- 25 See Armistead, note 18, supra.
- 26 Id., 22 Cal.3d at 203-204, 149 Cal.Rptr. at 3-4.
- 27 (1981) 123 Cal.App.3d 583, 587-588, 176 Cal.Rptr. 717, 718-719.
- 28 See Stoneham I, note 18, supra, 137 Cal.App.3d at 736, 188 Cal.Rptr. at 135.
- 29 See also Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125, in which the Court held that Chapter 4600 of the Department of Corrections' Administrative Manual was a "regulation" and was not a rule of internal management because it "significantly affect[ed] the male prison population in the custody of the department."

- 30 The Department's Response contains the following background regarding the challenged memorandum. San Quentin's

" . . . location is in the central part of the San Francisco Bay Area. The high cost of housing near the prison and the congested roads result in long commute times for many San Quentin employees. The 2-hour advance warning requirement for employees taking sick leave is reasonably necessary in order for San Quentin's management to obtain replacement workers to start a shift on schedule. In comparison, California Medical Facility's (CMF) employees may be able to afford to live near the institution's location in Vacaville. This situation would call for a different 'local' rule. Therefore, the advance warning requirement for CMF employees might be one hour or one and a half hours instead of the two hour requirement at San Quentin."

- 31 See Poschman, supra, note 18.
- 32 Id., 31 Cal.App.3d at p. 943, 107 Cal.Rptr. at p. 603.
- 33 1988 OAL Determination No. 3 (State Board of Control, March 7, 1988, Docket No. 87-009), California Administrative Notice Register 88, No. 12-Z, March 18, 1988, pp. 855, 864; type-written version, p. 10.
- 34 Government Code section 13959.
- 35 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, pp. 1682, 1685; typewritten version, p. 4.
- 36 See Stoneham I, note 18, supra, 137 Cal.App.3d at 736, 188 Cal.Rptr. at 135.
- 37 Cf. 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009) California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-82; typewritten version p. 11, which identified the following significant public interests involved in the Department of Corrections' "Classification Manual":

"The classification process involves the balancing of

two significant public interests: (1) the need to protect the general public, departmental staff and other prisoners from inmates who are prone to violence or likely to escape or both; and (2) the need to control expenditure of public funds by minimizing the number of inmates who are confined in maximum-security, intensively supervised environments." [Emphasis added.]

Cf. also 1988 OAL Determination No. 6, note 35, supra, which identified the following significant public interests involved in sections 7300 and 7301 of the Department of Corrections' "Administra-tive Manual":

"1. The need to resolve inmate grievances quickly and fairly within the prison system, thus making it unnecessary to expend significant resources litigating such matters in state or federal court.

"2. The need to provide feedback to management on local practices which may be unnecessary or counterproductive."

38 We wish to acknowledge the substantial contribution of Unit Legal Assistant Kaaren Morris and Senior Legal Typist Tande' Montez, in the preparation of this Determination.